

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Implementation of the Pay Telephone
Reclassification and Compensation
Provisions of the Telecommunications
Act of 1996

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CC Docket No. 96-128

**OPPOSITION OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
TO REQUESTS FOR ADDITIONAL TIME
TO FILE SYSTEM AUDIT REPORTS**

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The American Public Communications Council ("APCC") hereby opposes ten pending requests for temporary waivers of the audit requirement of Section 64.1320 of the Commission's revised payphone compensation rule. 47 CFR § 64.1320. The petitioners, listed on Attachment 1 hereto, seek additional time ranging from two months to nine months.¹ So far as APCC is aware, the Commission has not yet acted on any of these requests and none of the requesting carriers has yet submitted an audit report.

I. THE COMMISSION SHOULD DENY ANY ADDITIONAL TIME

The Commission should deny all ten of these requests. First, the carriers have had more than ample time to complete their audits. Second, none of the carriers has

¹ A number of other carriers requested additional time but have since filed audit reports. One other carrier, Pioneer Long Distance, Inc., requested a six-month waiver to file an audit report limited to the period July 1, 2004, to August 20, 2004; for subsequent periods, the company states it has arranged for its Intermediate Carrier to pay compensation. APCC takes no position in this Opposition regarding these other requests.

shown special circumstances that are sufficient to justify a waiver of the due date.² Third, none of the petitioners who filed requests prior to the official due date for the reports has even complied with the alternative due date proposed in its request.

Granting the requested waivers would undermine the audit reporting rule. The Commission relies on the audit report requirement to prevent the recurrence of switch-based resellers' prior flouting of the payphone compensation rule. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128, Report and Order, FCC 03-235, ¶34 (rel. October 3, 2003) ("Order"), *recon.*, FCC 04-251 (rel. October 22, 2004) ("Order on Reconsideration"). It is precisely the type of casual attitude towards compliance exhibited by these petitioning carriers that compelled the Commission to impose the audit requirement in the first place. The Commission has already given notice that it will enforce its rules strictly against carriers who "have been lax in fulfilling their obligations." *Order* ¶44; *see also Order on Reconsideration* ¶5 n.17. The Commission should not only deny the requested waivers, but also should make clear that carriers who have no audited data to justify their compensation payments must pay for 100% of the calls delivered by their Intermediate Carrier. *See id.* ¶20 (Completing Carrier's reliance on "no call completion data, or

² Most of the requests are inappropriately styled as motions for extension of time. The audit reporting due date is not a procedural deadline. It relates to the timing of compliance with a substantive regulatory requirement. The appropriate vehicle for requesting additional time is a petition for waiver, and the applicable standard is the Commission's waiver standard, requiring a petitioner to show that "special circumstances warrant a deviation from the general rule, such deviation serves the public interest, and waiver would be consistent with the principles underlying the rule." *1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, CC Docket No. 98-137, *Ameritech Corporation Telephone Operating Companies' Continuing Property Record Audit, et al.*, CC Docket No. 99-117, *GTE Telephone Operating Companies Release of Information Obtained During a Joint Audit*, AAD File No. 98-26, Further Notice of Proposed Rulemaking, FCC 00-119, at note 8 (rel. April 3, 2000) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (1969); *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983)).

unaudited call completion data . . . would not protect the PSP's interest in receiving compensation for each and every completed call").

A. The Petitioners Have Had Well Over A Year To Complete Their Audits

Carriers have been on notice of their new compensation obligations since October 3, 2003. At that time, the Commission expressly warned carriers that the revised rule would take effect upon Office of Management and Budget ("OMB") approval, which was likely to occur within 120-150 days. *Order* ¶46. The Commission concluded that compensation system audits could be completed "well before the 120 to 150 day OMB review period concludes." *Id.* ¶47. In fact, because OMB approval was delayed, carriers had a far longer period – 271 *days*, or until July 1, 2004 – to come into compliance. It is now well over a year since the carriers learned of the audit requirement, and the ten petitioners still have not complied.

Despite this extended nine-month lead time, the petitioners apparently waited until the last minute to conduct their audits. None of the ten requests for additional time was filed more than eight days before the July 1, 2004, due date for system audit reports. Three of the petitioners waited until *after* the July 1 deadline to file their petitions.³ If a carrier waited until the last minute – or beyond – before initiating a tracking system audit, it has only itself to blame.⁴

³ Cincinnati Bell Any Distance, Inc., ("CBAD"), Petition for Waiver (filed November 22, 2004)("CBAD Petition"); Operator Service Company ("OSC"), Petition for Waiver (filed October 21, 2004) ("OSC Petition"); Telco Group, Inc. ("Telco"), Motion for Extension of Time (filed July 20, 2004)("First Telco Motion").

⁴ CBAD, who did not request additional time until November 22, 2004, states that it believed the audit was due on July 1, 2005, until it reviewed the Commission's *Order on Reconsideration* and realized that the due date was July 1, 2004. The initial *Order* was quite clear on this point, and no other carrier claims to have misunderstood it.

Carriers have now had well over a year to complete their audits. There is no excuse for carriers to delay compliance any further.

B. The Petitioners Fail To Allege Facts Justifying A Waiver

Only one of the carriers (OSC) provides any sworn statement of facts underlying its request for a waiver, and none provides even an unsworn statement of facts that is sufficient to justify a waiver. Most do not provide *any* explanation of their non-compliance that goes beyond vague allusions to time limitations. For example, the entire justification proffered by Total Call International, Inc. ("Total Call") for its request for a three months' extension consists of a single sentence: "Total Call has attempted in good faith to meet the July 1, 2004, deadline; however Total Call requires additional time."⁵ Seeking a waiver based on this naked assertion alone mocks both the Commission's waiver process and the compensation rules themselves.⁶

⁵ Total Call, Motion for Exemption/Extension of Systems Audit, filed July 1, 2004. (APCC did not learn of Total Call's filing, which is uncaptioned, until a few days ago.) Total Call has not even complied with the extended October 1, 2004, due date it requested.

⁶ See also BAK's request (BAK's entire request consists of a single uncaptioned, unsigned two-line sentence); Big River Telephone Co. ("Big River"), Motion for Extension of Time at 1 (filed June 23, 2004); Callipso, Motion for Extension of Time at 2 (filed June 23, 2004)("The Company has not had sufficient time in which to implement the auditing requirements due to some internal and external resource constraints")("Callipso Motion"); Choice One Communications, Inc. ("Choice One"), Petition for Waiver or, in the Alternative Motion for an Extension of Time at 2 (filed July 1, 2004)("Choice One has learned that finalizing the audit required by Section 64.1320(b) may be a significantly more time consuming process than expected"); First Telco Motion at 1 ("Telco Group . . . requires additional time to complete the audit of its call tracking system"); Telco Group, Inc., Motion for Extension of Time at 2 (filed October 1, 2004)("Second Telco Motion")("Due to unforeseen circumstances, the auditor will be unable to complete its assessment and report by the October 1, 2004 deadline previously requested"); US LEC Corp. ("US LEC"), Motion for Extension of Time at 2 (filed June 29, 2004).

The more elaborate explanations offered by a few carriers are also inadequate.⁷ With one exception,⁸ the carriers do not even try to explain why they could not make alternative payment arrangements pending completion of the audit.

BAK and Choice One do not even state whether they have completed the changes to their networks necessary to track dial-around calls. Not only do these carriers effectively admit they have been inexcusably dilatory, but they also fail to explain how they intend to fairly compensate payphone service providers (“PSPs”) during the interim. As noted above, the Commission should make clear that carriers who do not submit a timely audit and who have no audited data to support their compensation payments must pay for 100% of the calls delivered by their Intermediate Carriers. *See Order on Reconsideration* ¶20.

C. Most Of The Petitioners Have Failed To Meet Their Own Due Dates

The subsequent behavior of the carriers does not inspire confidence that they are taking their audit obligations seriously. Eight of the ten petitioners have failed even

⁷ CBAD states that it could not complete a timely audit because it did not become a switch-based carrier until June 11, 2004. According to CBAD, it did not even have a switch in place prior to that time. CBAD Petition at 2. If so, this indicates extremely bad planning on CBAD’s part. The purpose of the audit requirement is to ensure that carriers have established and tested their call tracking systems *before* those systems are actually used. CBAD should have prepared, audited and tested its compensation system long before it had to actually began using the system.

OSC states that the revised regulations “were given to our personnel to respond at a time when the company was involved in a corporate ownership change, and, unfortunately, this verification was unintentionally and inadvertently overlooked while other pressing matters regarding the change of company ownership was going on.” OSC Petition at 3-4. OSC, however, provides no details regarding the ownership change, or any satisfactory explanation of why compliance with the audit requirement was “overlooked” for more than a year.

⁸ CBAD states that it could not make alternative arrangements because it is a facilities-based long distance carrier and “there is no intermediate carrier with whom CBAD can contract” *Id.* at 3.

to comply with the extended due date selected in their original motions.⁹ Of those eight, five (BAK, Big River, Choice One, Total Call and US LEC) did not even acknowledge their failure to comply by requesting a further extension. A sixth, Callipso, did request a further extension (from two to three months) but then failed to comply with even the second requested due date.

II. CALLIPSO'S CLAIM OF "VOLUNTARY" COMPLIANCE DOES NOT JUSTIFY ITS FAILURE TO SUBMIT A TIMELY AUDIT REPORT

Callipso requests "leniency" from the Commission on the basis that it is a "provider of IP-based services" and as such is only a "voluntary participant" in the compensation system. Callipso Motion at 1, 2. According to Callipso, it is not a carrier but only an "enhanced service provider," and on that basis is exempt from the compensation rules. *Id.* at 1. Callipso adds that, nonetheless, it "has decided to voluntarily adhere to the Commission's payphone compensation rules due to the demands of its carrier-customers and pressure from payphone service providers." *Id.*¹⁰

⁹ The remaining petitioners, CBAD and OSC, did not even request an extension of time until three to five months after the due date.

¹⁰ It is unclear what "pressure" from PSPs Callipso is referring to. PSPs' interest is to collect compensation from *somebody* on every call. If Callipso's underlying interexchange carrier ("IXC") is willing to take responsibility for paying compensation pursuant to a reasonable agreement, PSPs are unlikely to object. Indeed, as the record of this proceeding clearly establishes, PSPs generally would prefer to collect compensation from underlying carriers rather than from providers of resale service, IP-based or otherwise. On the other hand, if Callipso's underlying carrier is refusing to pay on the grounds that Callipso is the "Completing Carrier," while Callipso takes the position that it is *not* a "Completing Carrier," then PSPs have no choice but to "pressure" both carriers until one of them pays. As these mutual fingerpointing scenarios are all too likely to proliferate as IP-based services take hold, it is critical for the Commission to issue the rulings requested by APCC in its comments in the Commission's *IP-Enabled Services* proceeding. See Comments of APCC, filed May 28, 2004, in WC Dkt. No. 04-36.

Even if Callipso's unsworn characterization of itself as a "provider of IP-based services" could be accepted without any supporting documentation, that would not establish that Callipso is exempt from compensation obligations. First, the Commission has nowhere ruled that providers of IP-based services are exempt from compensation obligations. Indeed, the Commission has not even ruled that "enhanced service providers" are exempt from compensation obligations. The footnote in the Commission's *Order* cited by Callipso states only that the Commission declined to rule on whether enhanced service providers were subject to the rules because the issue had not been properly raised in the notice of proposed rulemaking. *Order* ¶27 n.74.


Second, even if Callipso might be exempt from compensation obligations, that does not justify Callipso's dilatory approach to filing an audit report. Indeed, Callipso's assertion of a "voluntary" commitment puts PSPs in a difficult position. If Callipso's "commitment" is purely voluntary, then Callipso could back out of its "commitment" at any time, leaving PSPs holding the bag. If Callipso wants to take responsibility for payment, then it should, at a minimum, forthrightly accept that responsibility and timely comply with all requirements applicable to Completing Carriers. Otherwise, Callipso should leave the compensation responsibility to its underlying carrier.

CONCLUSION

For the foregoing reasons, the Commission should deny the petitions for waiver of the audit requirement of the payphone compensation rule filed by the carriers listed on Attachment 1.

Dated: December 6, 2004

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

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ATTACHMENT 1

REQUESTS FOR ADDITIONAL TIME TO FILE SYSTEM AUDIT REPORTS

PETITIONER	FILING DATE(S)	EXTENSION REQUESTED
ATX Licensing, Inc. and Corecomm Newco, Inc.	6/23/04	
Requested further extension	9/30/04	1/1/05 (six months)
BAK	7/1/04	10/1/04 (three months)
Big River Telephone Company, LLC	6/23/04	9/1/04 (two months)
Callipso Corporation	6/23/04	
Requested further extension	8/4/04	10/1/04 (three months)
Choice One Communications Inc.	7/1/04	9/1/04 (two months)
Cincinnati Bell Any Distance, Inc.	11/22/04	4/1/05 (nine months)
Operator Service Company	10/21/04	1/1/05 (six months)
Telco Group, Inc.	7/20/04	
Requested further extension	10/1/04	1/1/05 (six months)
Total Call International, Inc.	7/1/04	10/1/04 (three months)
US LEC Corp.	6/29/04	9/1/04 (two months)

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2004, the foregoing Opposition of the American Public Communications Council to Requests for Additional Time to File System Audit Reports was delivered via first-class U.S. Mail, postage pre-paid to the following:

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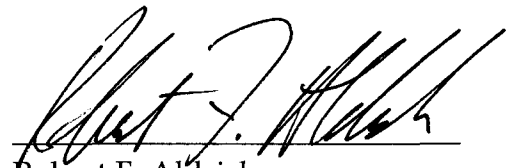
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